Circuit Court for Carroll County
Case No. K-16-047554

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2285

September Term, 2017

ROBERT T. BOSLEY

v.

STATE OF MARYLAND

Wright,
Graeff,
Sharer, J. Frederick,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: February 19, 2019

After a jury trial in the Circuit Court for Carroll County, Robert T. Bosley, appellant, was found guilty of first-degree murder, conspiracy to commit first-degree murder, first- and second-degree assault, and conspiracy to commit first-degree assault. He was sentenced to life without the possibility of parole for the first-degree murder conviction and a concurrent term of life for the conspiracy to commit first-degree murder conviction. The remaining convictions merged for sentencing purposes. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents the following three questions for our consideration:

> I. Did the [trial court] err in denying the motion to suppress appellant's statements?
>
> II. Did the trial court err by denying appellant's motion for a new trial when counsel discovered after trial that Detective Brandon Holland had been the subject of an internal investigation for failing to be truthful?
>
> III. Did the trial court err in refusing to give defense counsel's requested jury instruction for second-degree depraved heart murder?

For the reasons set forth below, we shall answer all three questions in the negative and affirm the judgments of the circuit court.

FACTUAL BACKGROUND

This appeal arises out of the brutal murder of Kandi Gerber on August 8, 2016. At that time, Ms. Gerber lived with her boyfriend, Bret Wheeler, in the basement of a home located at 2000 Dennings Road in Carroll County. The home was owned by Cheryl Bosley, who lived in the main living areas of the home with her adult son, Jeffrey Turco,

and her ten-year-old son, Noah Glass. On August 8th, Mr. Turco's girlfriend, Lindsay Ulsch, moved her belongings into the Dennings Road home. Mrs. Bosley's husband, appellant, was not living in the home at the time because he was incarcerated at the Carroll County Detention Center, where he participated in a work release program.

The home had a main entrance in the front and an exterior entrance to the basement. As Ms. Ulsch and Mr. Turco were moving belongings from Ms. Ulsch's parents' house to the Dennings Road house, Ms. Ulsch observed Ms. Gerber in the backyard and going in and out of the basement. Noah Glass was also in the house.

At one point, as Ms. Ulsch and Mr. Turco were leaving the house at Dennings Road, they encountered appellant and Mr. Wheeler in Mr. Wheeler's yellow pick-up truck. Appellant and Mr. Wheeler stopped and asked Ms. Ulsch and Mr. Turco to take Noah with them for about an hour because they were going to talk to Ms. Gerber to evict her from the house and they did not want Noah to hear any yelling if there was a fight. Appellant was angry with Ms. Gerber because he believed that, a couple of days before, she had called his work release program and reported that he was not working as he was supposed to and had left the county, possibly to go to Ocean City. Appellant was "upset" and "angry" and wanted Ms. Gerber to leave the house. He asked Mr. Turco "if he was getting on his side," and told him "it was about to get real." According to Ms. Ulsch, Mr. Wheeler and Ms. Gerber were also not getting along, in part because Ms. Gerber did not like Mr. Wheeler hanging out and drinking with appellant.

In response to appellant's request, Ms. Ulsch and Mr. Turco went back to the Dennings Road house, got Noah, and drove to a local convenience store. Mr. Wheeler dropped off appellant at the edge of the Dennings Road property and then followed the others to the convenience store. Appellant was observed approaching the house as if he was sneaking, walking "through the yard lightly."

Once at the convenience store, Ms. Ulsch observed that Mr. Wheeler "was obviously intoxicated." Although he said he was okay, Mr. Wheeler started talking about "really strange things." He asked Ms. Ulsch and Mr. Turco if they had seen Phantom of the Opera. He mentioned that he had watched it the night before and made reference to a scene where a "guy jumped through the curtain and killed the girl." Because Mr. Wheeler "was under the influence of something," Ms. Ulsch thought he was "just being weird."

After a short time, Mr. Wheeler departed from the convenience store, but he asked the others to stay for about 20 minutes more. Ms. Ulsch still had "stuff to do," so the group stayed only for about 8 minutes and then drove back to the house on Dennings Road. As they pulled into the driveway, they observed Mr. Wheeler standing by his yellow truck, which was backed in. Appellant walked over to their car and was "distraught" that they had come back too soon. Appellant's arms were covered in "swampy mud" up to his elbows. He said to Mr. Turco, "for once in your life be a good brother and take Noah out of here," but Mr. Turco and Ms. Ulsch refused because they "had stuff to do."

Appellant was angry. He said to Noah, "I love you, go play your games," which he did. According to Noah, appellant went into the basement. Subsequently, Noah heard "a groaning type of noise" that lasted for 30 to 40 seconds. He was "most likely sure" the noise came from appellant. Noah did not hear any kind of arguing or fighting. Thereafter, Noah heard the yellow pick-up truck start. He looked out the window and saw appellant driving the truck and Mr. Wheeler in the passenger seat. The tailgate was open and there was a tarp folded over itself, but it did not look like anything was in it.

After refusing to take Noah with them, Ms. Ulsch and Mr. Turco left in their vehicle, but they returned several minutes later and observed that the pick-up truck was gone and Noah was alone at the house. Ms. Ulsch asked Mr. Turco to check on Ms. Gerber to see if she needed help moving her possessions. Mr. Turco asked Noah to yell downstairs and ask Ms. Gerber if she needed any help. After Noah looked down the basement steps, he asked Mr. Turco, "[w]hat happened down there?" When Mr. Turco and Ms. Ulsch looked down the stairs, they saw "blood everywhere." Mr. Turco walked down the stairs, but there was no one in the basement. He observed blood all around the basement steps and drag marks toward the basement door. Ms. Ulsch dialed Ms. Gerber's phone number and then heard a phone ringing in the pool of blood in the basement. Mr. Turco picked up the phone and saw Ms. Ulsch's phone number on the screen. He threw down the phone and they all ran out of the house and called 911.

While they were outside calling 911, appellant and Mr. Wheeler returned. There was blood on the truck and Ms. Ulsch observed alcohol in the truck. Mr. Turco told them that the police were coming and they "drove away real fast and peeled wheels."

Shortly thereafter, Bradley Merrell, a man who owned a home improvement company and had previously employed both appellant and Mr. Wheeler, pulled into the driveway. Mr. Turco gave him a summary of what had happened and then Mr. Merrell left.

Mr. Merrell had received a phone call from appellant, who was using Mr. Wheeler's phone, at about 3:40 p.m. that afternoon. Appellant asked Mr. Merrell to come to his home on Dennings Road because he wanted his help asking Ms. Gerber to leave. Mr. Merrell told appellant that he had appointments at 5 p.m. and would come as soon as he could. Appellant called him again at 4:30 or 5 p.m. and at 5:40 p.m. In their second phone conversation, Mr. Merrell asked appellant, "what is this about?" Appellant replied, "I can't talk about it over the phone . . . just get up here as soon as you can." When Mr. Merrell arrived at appellant's house, a young man and woman told him "you don't need to be here right now, there's blood down in the basement and we called the cops." He then called appellant, who asked Mr. Merrell to meet him at the home of his ex-mother-in-law, Sandra Schwartz, who lived at 750 South Springdale Road, not far from Mr. Merrell's home.

As Mr. Merrell was driving to Ms. Schwartz's house, he observed the yellow pick-up truck that he had purchased for Mr. Wheeler six months earlier parked in front of a liquor store. He pulled in and met appellant, who was coming out of the liquor store. He then followed appellant and Mr. Wheeler as they drove to Ms. Schwartz's house, which was 2 to 3 minutes away. When they arrived, appellant got out of the pick-up truck and went into the house. Mr. Merrell walked over to the driver's side of the pick-up truck and saw that Mr. Wheeler was covered in blood "all over his clothes, down the side of his

neck, on his forehead, all over his arms, all over his pants, his legs and boots and everything." He also observed a pool of blood in the back of the truck and a box of shells inside the truck on the passenger side. Mr. Wheeler told Mr. Merrell that appellant "killed Kandi" and "slit her throat." Mr. Merrell asked where she was and Mr. Wheeler said that they took her "out on some back road and we dumped her." Mr. Merrell asked where, but Mr. Wheeler said he did not have a good sense of direction. When Mr. Merrell asked Mr. Wheeler if he was sure that Ms. Gerber was dead and if they could go get her, he responded "no, she was dead."

Appellant came out of the house and told Mr. Merrell that he and Ms. Gerber got into an argument, that she pulled a knife and came charging at him, that he side-stepped her, put her in a head lock, and slit her throat. As appellant walked toward Mr. Merrell explaining what had happened, he made a slicing motion with his hand. Appellant asked Mr. Merrell if he would get rid of their clothes, but Mr. Merrell said no. Mr. Merrell was nervous and attempted to get away as calmly as he could.

Appellant told Mr. Wheeler to go inside and take a shower. Mr. Merrell asked appellant where they had taken Ms. Gerber, and he said they took her body to the end of Mallard or Muller Road and threw her in the woods. As Mr. Merrell slowly moved toward his own vehicle, appellant removed all his clothing except for his underwear. Once Mr. Merrell got back into his vehicle, appellant walked over and grabbed the window, and Mr. Merrell told him not to touch his vehicle. Ms. Schwartz came out of her house and started "hollering and screaming" that she was going to get caught and go

to jail for perjury and that she had to call the police. Mr. Merrell drove to the end of the driveway, found an address on some mailboxes, and called the police.

Ms. Schwartz testified that in the early evening on August 8, 2016, appellant arrived at her home with Mr. Wheeler. They both wore shorts, but no shirts. Appellant said that they had hit a deer and asked if Mr. Wheeler could take a shower, which Ms. Schwartz allowed. Ms. Schwartz smelled alcohol on appellant's breath. She informed him that his wife had called and left a message on her answering machine, but he said that he did not want to call her back and did not want Ms. Schwartz to call her back either. After taking a shower, Mr. Wheeler walked out of the house with one of Ms. Schwartz's bath towels wrapped around him. She confronted him about taking her towel and he replied, "[l]ook, sweetheart, nothing's wrong, I just want to use your pressure washer." He also asked for a trash bag. Ms. Schwartz observed a bottle of beer in the pick-up truck. She told Mr. Wheeler he could not use her towel and asked both men to leave her property. She then went into her house and closed and locked the doors. As she was walking around the house making sure that everything was closed, she looked outside and saw police officers on her driveway with their guns drawn.

Carroll County Sheriff's Deputy Daren Metzler responded to Ms. Schwartz's home just ahead of Deputy Green, who pulled in behind him. Deputy Metzler observed a yellow pick-up truck parked in the driveway in front of a garage and an individual, later identified as Mr. Wheeler, in the driver's seat. He also observed appellant standing under the open garage door "pacing a little bit." Appellant had "blood all down the front" of his shorts. Deputy Metzler drew his sidearm and ordered appellant to sit down, which he

did. Deputy Green took appellant into custody. Deputy Metzler ordered Mr. Wheeler to show his hands and then handcuffed him and took him into custody. Mr. Wheeler was wearing only boxer shorts. Deputy Metzler noticed a beer can with condensation on it in the center console of the pick-up truck. He also saw that the truck bed had blood all over it. There was a crowbar covered with blood and junk in the truck bed. Neither appellant nor Mr. Wheeler spoke with slurred speech, staggered, or otherwise appeared to be drunk, but Deputy Metzler noticed that appellant had alcohol on his breath.

Appellant and Mr. Wheeler were transported to the Sheriff's Department's northern office in Hampstead. Sergeant Brandon Holland arrived at the northern office shortly after appellant and Mr. Wheeler. He entered the building and started the recording equipment in two interview rooms. Thereafter, appellant was placed in one interview room and Mr. Wheeler was placed in the other. The recording equipment was on for the entire time that appellant was in the interview room. About an hour after appellant arrived, Sergeant Holland and Brittaney Soto, a forensic services technician with the Carroll County Sheriff's Office, entered appellant's interview room. Technician Soto photographed appellant, took swabs, and collected his clothing, which apparently had blood on them. Throughout the night, Sergeant Holland gathered information from various law enforcement officers. At some time after Technician Soto collected evidence, appellant asked to speak with Sergeant Holland and made statements about what had occurred. Sergeant Holland told appellant that he was "doing the right thing" and "[y]ou got to let me know what happened." At about 9:30 p.m., appellant was given Miranda warnings. At all times, appellant maintained that Ms. Gerber had stabbed

herself. Between 5:30 and 7:30 a.m., Sergeant Holland responded to the Dennings Road location to participate in a search for evidence, specifically the blade that might have been used to slit Ms. Gerber's throat. Appellant's recorded interview ended at about 9:16 a.m., when he was transported to the hospital because he had complained of having blood in his stool.

Officers from the Carroll County Sheriff's Office and two Maryland State Troopers secured the Dennings Road property. They observed blood on the exterior steps leading to the basement, blood, including a large pool of blood, inside the basement, shoe prints in the blood, and an area of blood that appeared to have had something dragged through it.

Carroll County Sheriff's Detective Richard Harbaugh interviewed Mr. Merrell, Ms. Ulsch, and Mr. Turco separately and then obtained search and seizure warrants for the Dennings Road home, Ms. Schwartz's home, and Mr. Wheeler's yellow pick-up truck. After the warrants were issued, at about 1:25 a.m. on August 9, 2016, Detective Harbaugh went to the Dennings Road location to help search for a knife blade that reportedly had been discarded in an old in-ground pool used as a burn pit. The fire department provided trucks with special lighting to illuminate the scene and officers conducted a search of the Dennings Road property. The search was eventually suspended, but it resumed the following morning.

Carroll County Sheriff's Detective Sergeant Michael Zepp received information concerning the location of the victim's body. He responded to an area off a gravel road near Muller Road and Old Washington Road, where he observed tire tracks in the gravel

leading to a grassy area. He discovered Ms. Gerber's body lying in tall grass. She had a 3 to 4 inch laceration on the left side of her neck and a small pool of blood on her left clavicle. There was significant fly activity around her nostrils, eyes, and mouth. A paramedic responded and pronounced her deceased. After the body was removed, Detective Zepp observed clumps of press board and blue nylon-type material, similar to the material of a tarp, where the body had been.

Detective Zepp also responded to Ms. Schwartz's home where he observed blood stains on the outside and around the top rail and tailgate of Mr. Wheeler's pick-up truck. In the truck bed, he observed a pool of blood and some of the same blue nylon strands and press board that were found under and around Ms. Gerber's body.

Thereafter, Detective Zepp went to the Dennings Road property. When the search for the blade was resumed on the morning of August 9, he utilized wire from a chicken coop to sift through the ash in the burn pit. After 15 to 20 minutes, he located a white bag with green writing and a utility knife blade.

Forensic Services Technician Kelly Harry took photographs at the location where Ms. Gerber's body was found, collected the blue fibers, and measured the width of the tire tracks in the gravel. She also responded to 750 Muller Road and collected two pieces of a blue tarp that were found in a trash can. She then went to Ms. Schwartz's home where she measured the width of the front and rear tires on Mr. Wheeler's pick-up truck. She also collected, among other things, a white trash bag containing several sets of clothing with suspected blood on them and a purse containing Ms. Gerber's identification card.

Technician Soto recovered blue fibers from the floor of the basement at the Dennings Road house. Later, she went to the Office of the Chief Medical Examiner and took custody of blue fibers that had been recovered from Ms. Gerber's left hand and clothing.

DNA testing on samples taken from Mr. Wheeler's boxer shorts, appellant's cargo shorts, the driver side wheel well, the tarp, and the basement stairs revealed that the blood on those items matched Ms. Gerber's DNA profile.

Dr. Melissa Brassell, an assistant medical examiner at the Office of the Chief Medical Examiner for the State of Maryland, conducted an autopsy on Ms. Gerber on August 9, 2016. At trial, she testified as an expert in the field of forensic pathology, specifically the cause and manner of death. In the autopsy, she observed 12 sharp force injuries, including cutting wounds, on Ms. Gerber's neck, abrasions and contusions on her face, neck, chin, chest, and extremities, and an air embolism on the left side of her neck. She also observed petechial hemorrhages which she explained were a sign of asphyxia. Toxicology tests for Ms. Gerber were positive for the presence of methadone and amphetamines. Dr. Brassell concluded that the cause of Ms. Gerber's death was multiple injuries including sharp force injuries to the neck, asphyxia, and blunt force injuries. The manner of death was homicide.

When questioned about whether Ms. Gerber's injuries could have been the result of suicide, Dr. Brassell testified that she did not observe any of the common characteristics of a self-inflicted injury. She explained that there were no hesitation wounds such as might be seen in a suicide, that the wounds on Ms. Gerber's neck were

not localized, and that individuals attempting to kill themselves "don't also have multiple other components of injury, such as asphyxia and blunt force trauma." She further explained that Ms. Gerber's injuries were consistent with having been beaten and strangled first and then having her throat cut with a sharp object.

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I.

Appellant contends that the circuit court erred in denying his motion to suppress statements he made to the police because his statements were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and were involuntary under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights. Specifically, he maintains that the court should have suppressed the statements he made prior to receiving *Miranda* warnings because they were made in response to a custodial interrogation or its functional equivalent. Appellant further argues that his waiver of *Miranda* rights was not voluntary because, just prior to giving the *Miranda* warnings, Detective Holland told appellant that he was doing the right thing by talking and telling the truth, which "was in direct conflict with appellant's right to remain silent." Lastly, appellant asserts that his statements were not voluntary under Maryland common law and federal and state constitutional standards. The suppression court considered and rejected each of these contentions.

A. Standard of Review

In considering a trial court's denial of a motion to suppress evidence, we consider only the record developed at the suppression hearing. *Sinclair v. State*, 444 Md. 16, 27 (2015); *Raynor v. State*, 440 Md. 71, 81 (2014) (quoting *Briscoe v. State*, 422 Md. 384, 396 (2011)). We view the evidence in the light most favorable to the prevailing party and accept the circuit court's findings of fact unless they are clearly erroneous. *Sizer v. State*, 456 Md. 350, 362 (2017); *Sinclair*, 444 Md. at 27. We review the suppression court's legal conclusions *de novo* and "mak[e] our own independent constitutional evaluation as to whether the officer's encounter with the defendant was lawful." *Sizer*, 456 Md. at 362 (citing *Ferns v. State*, 355 Md. 356, 368 (1999)).

B. The Suppression Hearing

Two officers from the Carroll County Sheriff's Office, Deputy Daren Metzler and Sergeant Brandon Holland, testified at the suppression hearing. On August 8, 2016, the date of Ms. Gerber's murder, Deputy Metzler responded to 750 South Springdale Road where he encountered Mr. Wheeler sitting in the driver's seat of his yellow pick-up truck and appellant standing underneath an open garage door. Deputy Metzler and another deputy instructed appellant to come out of the garage and sit or kneel in the driveway, and the other deputy took him into custody. Deputy Metzler asked Mr. Wheeler to step out of the pick-up truck, which he did. Appellant and Mr. Wheeler were separated. Each provided his name and date of birth, was patted down, placed in a patrol vehicle and transported to the Sheriff's Department's northern office in Hampstead. Deputy Metzler transported appellant. According to Deputy Metzler, appellant, who was wearing only a

pair of tan colored shorts with blood all over them, "seemed relatively calm" and had a faint odor of alcoholic beverage about his person.

On the way to the northern office, the two officers stopped along Route 482 because appellant needed to spit chewing tobacco out of his mouth. They arrived at the northern office at about 7:09 p.m. and waited for Sergeant Holland to arrive with a key and open the office door. When he arrived, appellant and Mr. Wheeler were placed in leg shackles, taken inside the building, taken to the restroom, and placed in separate interview rooms. At one point, one of the men asked the other "if they knew what this was all about," and the deputies instructed them that there was not to be any talking. The only other contact Deputy Metzler had with appellant was later that night when appellant requested to use the restroom again and the deputy escorted him there. Deputy Metzler testified at the suppression hearing that he did not ask appellant any questions or make any promises, threats, or inducements to him.

Sergeant Holland was called to respond to the northern office to "start the interview rooms." He arrived at approximately 7:20 p.m. and met Deputy Metzler and Deputy Green, who had Mr. Wheeler and appellant in their vehicles. Sergeant Holland entered the office and started the recording equipment for the two interview rooms. When Mr. Wheeler and appellant were brought inside, they were each escorted to the restroom and then placed in separate interview rooms.

Sergeant Holland testified that no questions were asked by him and no conversations were had with appellant outside the interview room. Appellant was placed in his interview room at about 7:29 p.m. and remained there until 9:41 a.m. the following

morning. He was continuously video recorded during the entire time he was in the interview room. The recording of appellant's time in the interview room was eventually copied onto 8 discs, which were entered into evidence in the suppression hearing as State's Exhibit 2A-2H. Portions of those recordings from discs 2A, 2B, 2C, 2F, and the last three minutes of the interview on disc 2H, were played in the courtroom during the suppression hearing.

Sergeant Holland filled out an interview room log and then followed appellant into the interview room. He asked appellant his name and then offered him food and drink. Sergeant Holland then left the room and appellant laid down on the floor. About an hour later, Sergeant Holland returned to the interview room with crime scene technician Brittaney Soto, who took photographs, collected appellant's clothing, and swabbed his hands for DNA. Appellant stated that it was "pretty freezing" in the interview room and asked for a blanket. According to Sergeant Holland, there was no blanket at the office and appellant did not get one until the following day, but he gave appellant a jumpsuit. Appellant was offered food and drink and was taken to the restroom several times. At one point, someone yelled and appellant asked what it was. Sergeant Holland responded that he did not know because he assumed it was Mr. Wheeler who had yelled from the adjacent interview room, and he did not want there to be any conversation between the two men.

At the time appellant arrived at the northern office, Sergeant Holland did not have much information about what was going on with the homicide investigation. He explained that appellant was kept in the interview for some time because law

enforcement officials were still gathering information at three crime scenes and witnesses were being interviewed at different locations. At about 8:15 p.m., Sergeant Holland received a phone call from another officer, who informed him that a female victim had been found and that the case was being investigated as a homicide.

At one point, appellant knocked on the door of the interview room and asked to speak with Sergeant Holland. When Sergeant Holland entered the interview room, appellant said that if the sergeant would get his Copenhagen chewing tobacco, he would sit and talk. Sergeant Holland responded, "[W]e are not ready for that," because he still did not have information about what was going on with the investigation.

Sergeant Holland left the interview room, went to the restroom, and grabbed appellant's can of Copenhagen chewing tobacco and an empty cup for him to spit into. When Sergeant Holland returned, he sat down at the table with a legal pad and said, "yes, sir." Appellant began to tell him about what had happened. Appellant claimed that Ms. Gerber had made a report against him, that he had no intention of harming her, and that Ms. Gerber waved a razor blade at him and he pushed her away. Ms. Gerber "started ranting about some other shit saying, 'well, who would believe you anyway? Nobody would believe you. Anyone of you.'" She then died in appellant's arms, and he "freaked" and did not know what to do. Appellant said he and Mr. Wheeler picked up Ms. Gerber's body, put it in the bed of a pick-up truck, and took it to Muller Road with the intention of making an anonymous tip.

At this point, appellant was crying. Sergeant Holland asked if he needed tissues and said, "[i]t's all right. Take your time." At the hearing on the motion to suppress,

Sergeant Holland testified that he was not exactly sure if appellant's emotion was genuine because he "never saw tears." Twice, appellant stated that Ms. Gerber "killed herself right in front of me," and cut "her throat right in front of me." Sergeant Holland said, "[d]on't – it won't do you any difference if you cry because you got to do it, all right?" Appellant complained that everyone was going to look at him "different" for his reactions after Ms. Gerber's death, and he said, "[w]hat am I supposed to do, fucking call the cops when I'm covered in her blood? I mean come on." Sergeant Holland replied, "[o]kay. You made a judgment call," and, "I wouldn't want to be in your shoes. No one, no one would expect that." Appellant continued to make statements including that Mr. Wheeler was "not going to admit to nothing. He's just loyal like that. But he wasn't there to see it. He just came down to the aftermath." Appellant then asked Sergeant Holland, "[s]o what now, man? I just don't know what the fuck to do." Sergeant Holland responded, "[w]ell, you're doing the right thing. You got to let me know what happened." Appellant replied, "[w]ell, that's what happened, man. The girl did it to herself and we freaked or I freaked."

At that point, Sergeant Holland exited the interview room and obtained an advice of rights form. When he returned, appellant continued to make statements, including but not limited to the following: "I got to stand up and fucking say what happened[;]" "[t]here's blood in the back of that truck, I guarantee it[;]" his intention was to leave Ms. Gerber's body within sight and then leave an anonymous tip "to see that she got a proper burial[;]" and, "I didn't know what kind of information they had on the anonymous tip in the work release so I didn't want them thinking that was some kind of motive for me to

go kill her." Appellant also said, "[s]he had some freaking, horrible mental breakdown and she frigging slit her throat." He explained that there was blood everywhere and said, "I didn't want that to happen. I just wanted to know why. That was all. Why would she do that?" When Sergeant Holland responded, "I don't know, man," appellant again claimed that Ms. Gerber "did it to herself" and that "[s]he took her own life."

Sergeant Holland told appellant that he was "doing the right thing," and he said, "I wasn't there and I need to know what happened, right? You know that. So, you're doing the right thing. The best you can do is just come out and tell me the truth. All right? It's the best thing that can happen here. But with that, with what you're telling me, I do have some questions. Okay? Just so we can clarify some things. All right?" Appellant responded, "[l]et's clarify them." Immediately thereafter, at approximately 9:20 p.m., Sergeant Holland reviewed and completed an advice of rights form which appellant signed. When Sergeant Holland asked appellant if he wished to talk with him, appellant replied, "[s]o far."

Once appellant had signed the form and waived his rights, Sergeant Holland questioned him. Throughout the questioning, appellant maintained that Ms. Gerber had committed suicide. At one point, Sergeant Holland said, "[y]ou know that what goes the furthest when it comes to the judicial system is being honest, right?" At the suppression hearing, Sergeant Holland acknowledged that he spoke with appellant "about being honest and morals and you know, that is where your grown up – brought up to do is tell the truth. I wasn't trying to entice him to give me his statement. To tell me the truth. It is just what people do, you are supposed to tell the truth."

At 5:22 a.m., Sergeant Holland left the northern office and responded to the home at 2000 Dennings Road, where he helped search for a blade that might have been used in the killing of Ms. Gerber and to see the crime scene for himself. Sergeant Holland used information from his view of the crime scene to ask follow up questions of appellant.

At the end of the recorded interview, appellant asked to use the restroom because he was "having some issues." At about 9:41 a.m. on August 9, 2017, appellant informed Sergeant Holland that he had some blood in his stool. An ambulance was called, and he was transported to the Carroll Hospital Center. That was the first time that Sergeant Holland was aware that appellant had any medical issues or was in any kind of medical distress.

B. Constitutional Considerations

In its seminal decision in *Miranda v. Arizona*, the Supreme Court held that in order to combat the "inherently compelling pressures" of custodial interrogation, "which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely[,]" any person taken into custody must receive the benefit of certain widely familiar procedural safeguards:

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of any attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda, 384 U.S. at 467, 479.

An individual in custody must be informed of these rights prior to being interrogated so that he or she is not compelled to incriminate himself or herself in

violation of the Fifth Amendment. *Id.* at 467. The Fifth Amendment to the Constitution of the United States provides, in relevant part, that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V. The Fifth Amendment is made applicable to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). Similarly, Article 22 of the Maryland Constitution provides "[t]hat no man ought to be compelled to give evidence against himself in a criminal case." Md. Const., Decl. of Rights, Art. 22. The Fifth Amendment and Article 22 provide a privilege against being compelled to be a witness against oneself. *Hof v. State*, 337 Md. 581, 597 (1995).

In *Miranda*, the Supreme Court held that statements obtained from defendants during custodial interrogation or its functional equivalent, without the full warning of constitutional rights, and a waiver of those rights, were inadmissible as having been obtained in violation of the Fifth Amendment privilege against self-incrimination. *Miranda*, 384 U.S. at 478-79. For *Miranda* warnings to be required, a defendant must be in custody and subject to interrogation. *Id.* at 444. In addition to express questioning, interrogation includes "its functional equivalent," such as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980) (footnotes omitted). The Supreme Court made clear in *Miranda* that protections do not extend to statements volunteered to law enforcement officials:

> In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege [against compelled self-incrimination] while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment[.] and their admissibility is not affected by our holding today.

Miranda, 384 U.S. at 478 (footnote omitted).

C. Statements Made Prior to Miranda Advisements

With these standards in mind, we turn to appellant's contention that his pre-*Miranda* statements were made while he was subject to the functional equivalent of interrogation after being left alone in a cold interview room for about one and a half hours while dressed only in shorts that had blood on them. Appellant maintains that these circumstances "created an atmosphere in which [he] was willing to give up." In addition, appellant asserts that Sergeant Holland "further encouraged [him] to talk when he placed a legal pad on the table and said, "Yes, sir."

Appellant's claim that the conditions in the interview room were such as to overcome his will to resist making a statement are not supported by the record. As the suppression court found, appellant entered the interview room at about 7:29 p.m. after he was permitted to use the bathroom, his handcuffs were removed, and his legs were shackled. The crime scene technician arrived and, among other things, collected appellant's clothes. He was then given a jump suit to wear. There is nothing in the

record to suggest that appellant showed any outward sign of distress and, although he complained of being cold, he was not shivering, hugging his body, or in any other way attempting to protect against the cold. Moreover, he was provided with coffee and, in addition to giving him a jump suit, Sergeant Holland attempted to find him a blanket. Thus, the suppression court did not err in finding that the facts did not support appellant's contention that the conditions in the interview room overcame his will to resist making a statement.

Nor is there anything in the record to suggest that Sergeant Holland sought to interview appellant. To the contrary, appellant initiated contact with Sergeant Holland and volunteered statements about how Ms. Gerber died. During the course of appellant's statement, Sergeant Holland made several comments, such as "okay," "uh-huh, and "all right," and also made statements, such as "[o]kay, you made a judgment call" and ""I wouldn't want to be in your shoes. No one, no one would expect that." These words and statements merely indicate that Sergeant Holland was listening to appellant and did not constitute an interrogation. Similarly, the comments made by Sergeant Holland after appellant started to cry were expressions of empathy, did not require any response, and in no way provoked any incriminating statement. As we noted in *Bazzell v. State*, a defendant who volunteers a statement without being questioned or without any compelling influences is not subject to interrogation, and the law enforcement officer is not required to stop that defendant from speaking. 6 Md. App. 194, 198-99 (1969). Appellant's statements were unsolicited, freely made, and were not the result of a custodial interrogation.

We reach a different decision with respect to Sergeant Holland's statements to appellant that, "you're doing the right thing" and "you got to let me know what happened." These statements were made just prior to the time Sergeant Holland left the interview room to obtain an advice of rights form. When he returned, but before he had an opportunity to advise appellant of his *Miranda* rights, appellant continued to talk about the crime, reiterating that Ms. Gerber slit her own throat, and stating that there was blood in the back of the truck, that he and Mr. Wheeler intended to dispose of Ms. Gerber's body in a place where it would be seen, and that they planned to leave an anonymous tip so that she could have a proper burial. Appellant then asked "what kind of charges" he was looking at, to which Sergeant Holland replied:

> Well, Robert, let me tell you, you are doing the right thing. I wasn't there and I need to know what happened, right? You know that. So you're doing the right thing. The best you can do is just come out and tell me the truth. All right? It's the best thing that can happen here. But with that, with what you're telling me I do have some questions. Okay? Just so we can clarify some things. All right?

Clearly, Sergeant Holland made these statements as he was preparing to interrogate appellant, and they constituted the functional equivalent of interrogation. Since appellant was not given *Miranda* warnings before Sergeant Holland made these statements, the information that appellant provided in response should have been suppressed. *See Phillips v. State*, 425 Md. 210, 224 (2012) (telling a suspect that the police officer would like to hear his/her side of the story, in order to induce the suspect to respond to questions or make a statement is acceptable "so long as the *Miranda* advisements have been given and the suspect has validly waived the right to remain silent

and the right to consult with an attorney."). Reversal is not required here, however, because the statements made in response by appellant were cumulative of statements he made earlier when he was not subject to interrogation and statements he made, after he was properly advised of his *Miranda* rights. *Dove v. State*, 415 Md. 727, 744 (2010) (evidence is cumulative and, therefore, harmless, when it tends to prove the same point as other evidence properly admitted).[1]

D. Knowing and Voluntary Waiver of Miranda Rights

Again pointing to Sergeant Holland's statement that appellant was "doing the right thing," as well as his statement "I need to know what happened," appellant argues that his waiver of his *Miranda* rights was not knowing, intelligent, and voluntary because the statements were in direct conflict with his right to remain silent. In addition, appellant directs our attention to a statement made by Sergeant Holland just prior to the *Miranda* advisements, in which Sergeant Holland said, "I am going to read this, okay? I'm going to read this out loud. I know you've heard them before but I've got to read them, okay?" Appellant asserts that this statement "minimize[d] the importance of the *Miranda* waiver and [made] it seem like a simple formality that had to be complied with." We are not persuaded.

In *Lee v. State*, 418 Md. 136, 150 (2011), the Court of Appeals wrote:

> Inquiry into the adequacy of the waiver of the *Miranda* rights "has two distinct dimensions":

[1] "Evidence is cumulative when, beyond a reasonable doubt, we are convinced that 'there was sufficient evidence, independent of the [evidence] complained of, to support the appellant['s] conviction[.]'" *Dove*, 415 Md. at 743-44 (alterations in original) (citing *Richardson v. State*, 7 Md. App. 334, 343 (1969)).

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if "the totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id. (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)) (citations and quotations omitted).

Viewed in context, Sergeant Holland's comments were mere exhortations to continue to speak the truth about what happened to Ms. Gerber and in no way suggested that appellant was required to speak. On the record before us, it is clear that appellant understood that he was not required to speak to Sergeant Holland.

As for appellant's contention that Sergeant Holland's comments minimized the importance of the rights he was waiving, he has failed to direct us to any authority requiring a certain formality when *Miranda* advisements are given. Here, Sergeant Holland explained the *Miranda* rights, ensured that appellant understood them, and obtained a knowing and voluntary waiver from him. That is all that was required.

E. Voluntariness of Statement

Appellant contends that all of the factors of his educational background and his experience in the interview room, taken together, show that the statements he made during the custodial interrogation were not voluntary under either state or federal constitutional law or Maryland common law. We disagree.

"'Only voluntary confessions are admissible as evidence under Maryland law.'" *Hill v. State*, 418 Md. 62, 74 (2011) (quoting *Knight v. State*, 381 Md. 517, 531 (2004)); *see also Lee*, 418 Md. at 159 ("confessions that are the result of police conduct that overbears the will of the suspect and induces the suspect to confess" are prohibited.). "When a defendant properly challenges the voluntariness of a confession or inculpatory statement in a pre-trial motion, the burden is on the State to affirmatively show voluntariness by a preponderance of the evidence." *Rodriguez v. State*, 191 Md. App. 196, 223 (2010) (citation omitted).

In *Hoey v. State*, 311 Md. 473 (1988), the Court of Appeals explained the overlapping tests a confession must satisfy to be deemed voluntary. First, under Maryland nonconstitutional law, a confession is voluntary if it is "'freely and voluntarily made at a time when [the defendant] knew and understood what he [or she] was saying.'" *Id.* at 481 (alterations in original) (quoting *Wiggins v. State*, 235 Md. 97, 102 (1964)). In *Winder v. State*, 362 Md. 275 (2001), the Court of Appeals, relying on *Hillard v. State*, 286 Md. 145, 151 (1979), gleaned "a two part test to determine the voluntariness of a custodial confession in circumstances where a defendant alleges that the police induced his or her confession by making improper promises[,]" explaining:

> We will deem a confession to be involuntary, and therefore inadmissible, if 1) a police officer or an agent of the police force promises or implies to a suspect that he or she will be given special consideration from a prosecuting authority or some other form of assistance in exchange for the suspect's confession, and 2) the suspect makes a confession in apparent reliance on the police officer's statement. As to the second prong, apparent reliance, we pointed out . . . that [o]ne common thread that runs through our cases is that the promise must have caused the suspect to confess. If a suspect did not rely on an interrogator's comments, obviously, the

> statement is admissible regardless of whether the interrogator had articulated an improper inducement. By definition, there would have been no "inducement" at all, because the interrogator "induced" nothing. Both prongs must be satisfied before a confession is deemed involuntary.

Winder, 362 Md. at 309-10 (internal citations omitted).

Second, a confession must satisfy the Due Process Clause of the Fourteenth Amendment of the federal constitution, which is construed in *pari materia* with Article 22 of the Maryland Declaration of Rights. *Hoey*, 311 Md. at 480 and n.2. The test for voluntariness under the federal constitution, like the second prong of the test under Maryland common law, turns on "'the crucial element of police overreaching.'" *Id.* at 485 (quoting *Colorado v. Connelly*, 479 U.S. 157, 163 (1986)). Thus, a confession is deemed voluntary unless there was improper "'police conduct causally related to the confession.'" *Id.* at 485 (quoting *Connelly*, 479 U.S. at 163).

We review *de novo* the court's "ultimate determination on the issue of voluntariness." *Knight*, 381 Md. at 535 (citations omitted). That determination must be made based upon the "totality of the circumstances." *Knight*, 381 Md. at 533. In conducting that analysis:

> [W]e look to all elements of the interrogation, including the manner in which it was conducted, the number of officers present, and the age, education, and experience of the defendant. Not all of the multitude of factors that may bear on voluntariness are necessarily of equal weight, however. Some are transcendent and decisive. We have made clear, for example, that a confession that is preceded or accompanied by threats or a promise of advantage will be held involuntary, notwithstanding any other factors that may suggest voluntariness, unless the State can establish that such threats or promises in no way induced the confession.

Id. at 533 (alterations in original) (quoting *Williams v. State*, 375 Md. 404, 429 (2003)).

1. *Maryland Common Law*

Appellant contends that his statements were improperly induced by Sergeant Holland's "entreaty to talk, to tell the truth, and that telling the truth goes far with the judicial system." This contention is without merit. There were no express or implied promises of special advantage in any of Sergeant Holland's statements. Sergeant Holland's exhortations to speak and tell the truth were not improper inducements. *See Ball v. State*, 347 Md. 156, 174-76 (1997) (telling a defendant that it would be "much better if [he] told the story" was a permissible exhortation and not an improper inducement.). Similarly, there was no express or implied benefit offered to appellant when Sergeant Holland said, "Well, you're doing the right thing. You got to let me know what happened" and "[w]ell, Robert, let me tell you, you are doing the right thing. I wasn't there and I need to know what happened, you know that." These statements were mere exhortations to keep talking.

The same is true with respect to Sergeant Holland's statement that "[y]ou know that what goes the furthest when it comes to the judicial system is being honest, right?" There was nothing in that statement to suggest that appellant would receive a benefit or be treated more leniently if he told the truth. Moreover, it is notable that, prior to any statements by Sergeant Holland, appellant decided to speak on his own and his version of events never changed throughout his entire interview. He consistently maintained that Ms. Gerber slit her own throat and killed herself. Accordingly none of Sergeant Holland's exhortations to tell the truth induced anything from appellant.

2. Federal and State Constitutional Law

In considering the totality of the circumstances surrounding appellant's statements, we conclude that he was not influenced by the conditions of the interview room or anything said by Sergeant Holland. Appellant is a 38 year old man with a tenth-grade education who can read and write and has experience with the criminal justice system. Further, he had been at the Sheriff's office for only an hour and a half before he decided, on his own, to speak about what happened to Ms. Gerber. He was offered and provided food, drink, a jumpsuit, and use of a bathroom. He specifically acknowledged that he was willing to speak with Sergeant Holland "[s]o far" and, after he received *Miranda* advisements, said he understood them. Clearly, he was aware that he could stop talking to Sergeant Holland at any time, but he did not do so until he requested medical assistance. His version of how Ms. Gerber died remained consistent throughout his interview and he steadfastly denied killing her. Nothing that Sergeant Holland said had any effect on the appellant's version of events. For all these reasons, the trial court properly concluded that appellant's statements were voluntary.

II.

Appellant argues that the trial court abused its discretion in denying his motion for new trial after it was discovered that Detective Holland had been the subject of a special investigation that called into question his credibility. The parties do not dispute that a special prosecutor prepared a report recommending that certain charges against Mr. McGuire, a defendant in another case that was also investigated by Detective Holland, be *nol prossed* because Detective Holland had placed a GPS device on Mr. McGuire's vehicle before he obtained judicial authorization to do so and failed to disclose in an

application for a search warrant that the GPS already had been placed on the vehicle. In support of his recommendation not to pursue charges against Mr. McGuire, the special investigator identified several factors concerning Detective Holland's credibility, including Detective Holland's statement to the original prosecutor that he had installed the GPS device on Mr. McGuire's vehicle after the warrant had been issued, and his failure to disclose his error in prematurely placing the GPS device on McGuire's vehicle despite earlier opportunities to do so. In his motion for new trial, appellant argued, as he does on appeal, that without the information about Detective Holland, he was unable to fully confront the detective and was deprived of the opportunity to obtain a fair trial.

Motions for new trial based on newly discovered evidence are governed, in part, by Md. Rule 4-331(c), which provides:

> (c) **Newly discovered evidence.** The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule:
>
> (1) on motion filed within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post conviction relief; and
>
> (2) on motion filed at any time if the motion is based on DNA identification testing not subject to the procedures of [Md. Code (2001, 2008 Repl. Vol.), Criminal Procedure Article ("CP") § 8-201] or other generally accepted scientific techniques the results of which, if proved, would show that the defendant is innocent of the crime of which the defendant was convicted.

The decision to grant a new trial rests in the sound discretion of the trial court and shall not be disturbed absent an abuse of discretion. *Campbell v. State*, 373 Md. 637, 665 (2003); *Brewer v. State*, 220 Md. App. 89, 111 (2014). The Court of Appeals has said:

> the breadth of a trial judge's discretion to grant or deny a new trial is not fixed and immutable; rather, it will expand or contract depending upon the nature of the factors being considered, and the extent to which the exercise of that discretion depends upon the opportunity the trial judge had to feel the pulse of the trial and to rely on his own impressions in determining questions of fairness and justice.

Merritt v. State, 367 Md. 17, 30 (2001) (internal quotations and citations omitted).

In order to prevail on a motion for new trial based on newly discovered evidence under Md. Rule 4-331(c), a defendant must demonstrate (1) that the evidence was newly discovered and was not capable of being discovered by due diligence; and (2) that the "newly discovered evidence 'may well have produced a different result, that is, there was a substantial or significant possibility that the verdict of the trier of fact would have been affected.'" *Baker v. State*, 367 Md. 648, 695-96 (2002) (quoting *Jackson v. State*, 358 Md. 612, 626 (2000)).

In *Jackson v. State*, we considered a case involving the alleged recanting of testimony by a witness and addressed the distinction between "impeaching" and "merely impeaching" evidence. *Jackson v. State*, 164 Md. App. 679, 697-99 (2005), *cert. denied*, 390 Md. 501 (2006). The defendant, Jackson, was convicted of two counts of sexual child abuse. *Id.* at 684. Pursuant to Md. Rule 4-331(c), he filed a motion for new trial based on newly discovered evidence on the ground that the victim had told a family member that she testified against Jackson, her father, under pressure from her mother and stepfather. *Id.* at 688. Jackson asserted that this evidence showed that the victim "recanted her testimony that she was abused by" him. *Id.* at 688. The trial court denied

the motion for new trial after determining that the victim had not recanted her testimony. *Id.* at 721.

On appeal, we explained:

> The distinction between "impeaching" and "merely impeaching," albeit nuanced, is pivotally important. Newly discovered evidence that a State's witness had a number of convictions for crimes involving truth and veracity or had lied on a number of occasions about other matters might have a bearing on that witness's testimonial credibility, but would not have a direct bearing on the merits of the trial under review. Such evidence would constitute collateral impeachment and would, therefore, be "merely impeaching." If the newly discovered evidence was that the State's witness had been mistaken, or even deliberately false, about inconsequential details that did go to the core question of guilt or innocence, such evidence would offer peripheral contradiction and would, therefore, be "merely impeaching." If the newly discovered evidence, on the other hand, was that the State's witness had actually testified falsely on the core merits of the case under review, that evidence, albeit coincidentally impeaching, would be directly exculpatory evidence on the merits and could not, therefore, be dismissed as "merely impeaching."

Id. at 697-98.

Subsequent to our decision in *Jackson*, the Court of Appeals decided *State v. Hunt*, a case arising from two petitions for writ of actual innocence based on an expert witness's falsification of his academic credentials. In *Hunt*, the Court found that in cases involving petitions for writ of actual innocence, our distinction between "impeaching" evidence and "merely impeaching" evidence was "overly rigid." 443 Md. at 263-64 (footnote omitted). In dicta, the Court stated that "[w]hen an expert witness is called to testify, it is conceivable that, based on the cumulative body of evidence presented at a given trial, falsity regarding the expert's credibility and qualifications might '[create] a substantial or significant possibility that the result may have been different.'" *Id.* at 264.

The Court's dicta in *Hunt* was later adopted and applied in *McGhie v. State*, 449 Md. 494 (2016), which also involved a petition for writ of actual innocence. In that case, the Court of Appeals held that, in assessing a motion for a new trial, a court must assume that the jury, had it known about an expert witness's untruthful testimony, would have discounted the expert's testimony entirely and any evidence associated with it. *Id.* at 512. A court must then determine whether there is a substantial possibility that the outcome of the trial would have been different in light of the other untainted evidence presented at trial. *Id.*

In the instant case, there was no assertion that Detective Holland falsified his credentials. Rather, the special prosecutor's report indicated that in an unrelated case, Detective Holland failed to disclose, and made false statements concerning, the installation of a GPS device on another defendant's vehicle. The trial court found that, even assuming that the evidence was newly discovered and that it was not capable of being discovered by due diligence, the special prosecutor's report was merely impeaching because it did not prove that Detective Holland had testified falsely at trial, but only that he may have made inconsistent statements in an unrelated case. In addition, the trial court determined that appellant failed to demonstrate that the special prosecutor's report created "a substantial or significant possibility that the verdict would have been different." *See McGhie*, 449 Md. at 512 (quotations omitted).

The issue before us is whether there was a substantial or significant possibility that the information about Detective Holland would have produced a different result in appellant's trial. Appellant argues that "the evidence was material because it could have

provided defense counsel with the ability to challenge Detective Holland on cross-examination." Specifically, he points to the hearing on his motion to suppress, wherein he argued that his statement to police had been induced by Detective Holland. Appellant asserts that the circuit court's ruling on the motion to suppress was based, in part, on a determination that Detective Holland was credible in his testimony that no inducements had been offered. Appellant also points to Detective Holland's trial testimony where he stated that appellant "was not credible in his statement because he had not had real tears coming out of his eyes." Appellant maintains that defense counsel was denied the opportunity to effectively challenge that attack on appellant's credibility because defense counsel was unaware that the detective's credibility had been called into question. We are not persuaded. The special prosecutor's report established, at best, that Detective Holland was untruthful in another case, not that he lied at appellant's trial.

With respect to improper inducements, appellant argued that Detective Holland urged him to continue to speak and to tell the truth. In evaluating whether a confession was improperly induced by the police, we are guided by the two-pronged test set forth in *Hillard v. State*, 286 Md. 145 (1979), which was discussed by the Court of Appeals more recently in *Hill v. State*, as follows:

> In *Hillard*, we established a two-pronged test for determining whether a confession is the result of an improper inducement by law enforcement. Under that test, an inculpatory statement is involuntary and must be suppressed if: (1) any officer or agent of the police force promises or implies to a suspect that he will be given special consideration from a prosecuting authority or some other form of assistance in exchange for the suspect's confession, and (2) the suspect makes a confession in apparent reliance on the police officer's explicit or implicit inducement. Both

> prongs of the *Hillard* test must be satisfied before a confession is deemed to be involuntary.
>
> The first prong of the *Hillard* test is an objective one. In other words, when determining whether a police officer's conduct satisfies the first prong, the court must determine whether a reasonable person in the position of the accused would be moved to make an inculpatory statement upon hearing the officer's declaration; an accused's subjective belief that he will receive a benefit in exchange for a confession carries no weight under this prong. Ultimately, the court must determine "whether the interrogating officers or an agent of the police made a threat, promise, or inducement." The threat, promise, or inducement can be considered improper regardless whether it is express or implied.
>
> If the suppression court finds that the law enforcement officer improperly induced the accused, then the second prong of the *Hillard* test requires the court to determine whether the accused relied on that inducement in making the statement he or she seeks to suppress. Specifically, the court must examine whether there exits a causal nexus between the inducement and the statement[.]

Hill, 418 Md. 62, 76-77 (2011) (internal quotation marks and citations omitted).

Detective Holland's testimony at the suppression hearing and at trial was corroborated by the video and audio recording of every interaction between appellant and Detective Holland, with the sole exception of those times when appellant left the interview room to use the bathroom. As for those instances, appellant did not contend at the suppression hearing, at trial, or in support of his motion for new trial, that Detective Holland made any improper inducement during a bathroom break. The trial court had the video and audio recording of all statements made by and between Detective Holland and appellant while in the interview room and, from them, obtained the content and the context of Detective Holland's statements. The determination of whether a police officer's statement or conduct constitutes an improper inducement is an objective

determination. *See Hill*, 418 Md. at 76 (2011) (citing *Winder v. State*, 362 Md. 275, 311 (2001)). There is nothing in the record before us to suggest that the trial court erred in concluding that no improper inducements were made by Detective Holland.

Appellant also argues that without a copy of the special prosecutor's report, he was unable to effectively challenge Detective Holland's testimony that appellant was not credible because he did not have tears when he was crying in the interview room. We reject this contention because Detective Holland did not make a determination about appellant's credibility. Rather, he testified that, at some point, appellant "appeared to be crying. I never saw actual tears, but he appeared to be crying." In response to appellant's crying, Detective Holland told him, "[n]o one is going to look at you differently if you cry. You've got to do what you've got to do." Further, Detective Holland acknowledged that he offered appellant tissues after he started to cry. Most importantly, the jury was able to judge for itself whether appellant's crying was genuine or feigned because they could view it on the video recording. As a result, the jury's assessment of appellant's credibility did not depend on whether the jurors believed Detective Holland's testimony that he did not see actual tears.

Lastly, there was substantial other evidence of appellant's guilt such that it cannot be said that there was a substantial or significant possibility that the jury verdict would have been affected by the impeachment of Detective Holland as a result of the special prosecutor's report. Even if the jurors discounted Detective Holland's testimony, they had the video recording of appellant's time in the interview room. In addition, there was evidence that appellant had a motive to kill Ms. Gerber because he believed that she had

made a report against him to the work release program. Rickie Lee Smith, who was incarcerated with appellant, testified that about two days before Ms. Gerber was killed, appellant said, in reference to the person who he thought made the report against him, "I'll kill the bitch." There was evidence that appellant went to some effort to ensure that he was alone with Ms. Gerber. He moved Ms. Gerber's body to a remote area, dumped it, and fled when Ms. Ulsch and Mr. Turco told him that the police had been called. Appellant had Ms. Gerber's blood on his clothing and asked Mr. Merrell to dispose of the clothes. Mr. Merrell testified that Mr. Wheeler told him that appellant "killed Kandi" and "slit her throat," but appellant told him that he had killed Ms. Gerber in self defense after she came at him with a knife. Notwithstanding appellant's claim that Ms. Gerber killed herself, or that he acted in self defense, he did not seek medical assistance for her. In light of all this evidence, the circuit court properly concluded that there was no substantial or significant possibility that the jury verdict would have been affected by the information in the special prosecutor's report pertaining to Detective Holland.

III.

Appellant contends that the circuit court erred in refusing to instruct the jury on depraved heart second-degree murder as defined in Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 4:17.8(A).[2] The responsibility of a trial judge to instruct the jury

[2] MPJI-Cr 4:17.8(A) provides:

> The defendant is charged with the crime of murder. This charge includes second degree murder and involuntary manslaughter.
>
> A. Second Degree Depraved Heart Murder.

in a criminal trial is governed by Md. Rule 4-325(c), which provides that "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law[.]" When requested to do so by a party, the trial court is required to "give a requested instruction that correctly states the applicable law and that has not been fairly covered in instructions actually given." *State v. Martin*, 329 Md. 351, 356 (1993), *cert denied*, 510 U.S. 855 (1993) (citation omitted); *see also* Md. Rule 4-325(c); *Dickey v. State*, 404 Md. 187, 197-98 (2008). "In evaluating a trial court's refusal to charge a jury as requested, [we] 'must determine whether the requested instruction was a correct statement of the law; whether it was applicable under the facts of the case [*i.e.*, whether the evidence was sufficient to generate the desired instruction]; and whether it was fairly covered in the instructions actually given.'" *Janey v. State*, 166 Md. App. 645, 654 (alteration added) (quoting *Gunning v. State*, 347 Md. 332, 348 (1997)), *cert. denied*, 392 Md. 725 (2006). When a court is requested to instruct the jury on a lesser included offense, the test is not whether there is sufficient evidence to convict on the lesser included offense but whether the evidence is such "'that the jury could rationally convict *only* on the lesser included

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> Second degree murder is the killing of another person while acting with an extreme disregard for human life. In order to convict the defendant of second degree murder, the State must prove:
>
> (1) that the conduct of the defendant caused the death of (name);
> (2) that the defendant's conduct created a very high degree of risk to the life of (name); and
> (3) that the defendant, conscious of such risk, acted with extreme disregard of the life-endangering consequences.

offense.'" *Burch v. State*, 346 Md. 253, 279, *cert. denied*, 522 U.S. 1001 (1997) (quoting *Burrell v. State*, 340 Md. 426, 434 (1995)) (emphasis in original).

Whether the requested instruction is generated by the facts is a question of law, *Roach v. State*, 358 Md. 418, 428 (2000), which "turns on whether there is any evidence in the case that supports the instruction." *Dishman v. State*, 352 Md. 279, 292 (1998). This threshold is not high. A criminal defendant is entitled to an accurate jury instruction so long as the defendant "'produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired.'" *Cantine v. State*, 160 Md. App. 391, 410-11 (2004) (quoting *Dishman*, 352 Md. at 292), *cert. denied*, 386 Md. 181 (2005). In determining whether "competent evidence exists to generate the requested instruction, we view the evidence in the light most favorable to the accused." *Fleming v. State*, 373 Md. 426, 433 (2003) (citations omitted).

Appellant argues that the evidence presented at trial supported a finding of a general intent to engage in life-threatening conduct, without a specific intent to kill. In support of that argument, he points to the testimony of Mr. Merrell, who stated that appellant told him that Ms. Gerber pulled out a knife and charged towards him, that he sidestepped her, put her in a headlock, and slit her throat. Appellant maintains that in light of that testimony, the jury should have been permitted to consider whether, at the time of the killing, he "possessed one of three *mentes reae* instructed by the court (premeditation, intent to kill or intent to inflict such severe bodily harm that death would be the likely result) or whether, instead, he possessed the *mens rea* required for depraved

heart murder (an extreme disregard of the life endangering consequence of his risky conduct)." We disagree and explain.

As the State points out, this precise issue was addressed by the Court of Appeals in *Burch v. State*, *supra*, and by this Court in *Costley v. State*, 175 Md. App. 90 (2007). In *Burch*, the defendant broke into the home of Robert and Cleo Davis, an elderly couple, for the purpose of stealing property that he could sell to purchase cocaine. *Burch*, 346 Md. at 259. When confronted by the couple, Burch attacked them and stole some guns, money, and a truck. *Id.* Both victims died as a result of the injuries inflicted by Burch. *Id.* Burch did not deny that he broke into the home and killed the victims. After a jury trial, he was convicted of "multiple offenses, including, as to each of the victims, premeditated first degree murder and three counts of felony murder based, respectively, on the underlying felonies of burglary, robbery, and robbery with a deadly weapon." *Id.*

The circuit court "instructed the jury on premeditated first degree murder, felony murder, and the intent to kill and intent to do serious bodily harm varieties of second degree murder, but refused to give [Burch's] requested instruction on depraved heart murder" as to both victims. *Id.* at 275, 281. At trial, Burch objected to the court's refusal to give the depraved heard instruction as to Mrs. Davis, arguing only that it was warranted by the evidence. *Id.* at 275. On appeal, he pointed to the fact that Mrs. Davis was alive when he left the house. *Id.* at 276. In light of the fact that he could have killed her instantly if he had chosen, Burch argued that "the jury could permissibly have found that his mental state was not an intent to kill or even an intent to do great bodily harm, but merely wanton recklessness and indifference to whether she lived or died." *Id.*

Burch also requested a depraved heart murder instruction with respect to Mr. Davis, but did not provide a basis for that instruction. *Id.* at 281. On appeal, Burch argued that when he was confronted by Mr. Davis, he "'grabbed a pair of scissors, and just reacted the best [he] knew how which resulted in the stabbing of him.'" *Id.* at 281. Burch maintained that his action was "'self-protective' and done only to 'incapacitate Mr. Davis, all without regard to whether Mr. Davis lived or died.'" *Id.*

The Court of Appeals rejected Burch's arguments on the ground that there was no rational basis for the jury to convict only of depraved heart murder. *Id*. at 280-81. With respect to Mrs. Davis, the Court stated:

> [Burch] pummelled a 78-year old, 97-pound frail woman, apparently with a telephone receiver, with such force as to break 13 ribs and two other bones and cause extensive bleeding. Neither the fact that he could have done even more damage and thus ended her life even quicker nor the fact that the victim was still alive when he left the house detracts, in the least, from the compelling inference that the beating he did administer must have been with the intent either to kill or to do such serious bodily harm that death would be the likely result. Under appellant's theory virtually any murder committed by beating or that does not involve instantaneous death could qualify as depraved heart murder. That is not the law . . . . The jury was not left with an all-or-nothing option. It was instructed on the two varieties of second degree murder upon which a plausible verdict could have been returned. It is simply beyond the realm of reasonableness to suppose that any rational jury could find that [Burch] administered the beating to Mrs. Davis with mere recklessness or indifference as to the result.

Id. at 280 (citation and footnote omitted).

Similarly, with respect to the killing of Mr. Davis, the Court noted:

> What [Burch] conveniently overlooks, of course, is that he stabbed Mr. Davis at least 11 times, once severing the aorta, once plunging more than three inches into his heart, and once penetrating the lung. That is hardly conduct engaged in "without regard to whether Mr. Davis lived or died." For the reasons set forth in the discussion concerning Mrs. Davis, it is clear

> that there was no basis for a depraved heart murder instruction as to Mr. Davis.

Id. at 281.

In *Costley*, which involved facts similar to both *Burch* and the instant case, we reached the same result, stating:

> In the present case, the evidence established that [Costley] went to a Target store and bought a chef's knife, then immediately went to the Nicholls' home. He immediately began to choke [Mrs.] Nicholls. Then, when she fell, appellant stabbed her as she lay on the ground. The autopsy report established that there were thirteen stab wounds, one of which penetrated seven and a half inches into the body, through the third and fourth ribs, through skin and chest muscles, causing a "significant amount of bleeding." There was a wound that penetrated five and a half inches into the body and fractured a rib, and another that penetrated into the liver, also causing a great deal of bleeding. There were "a group of stab wounds" in Mrs. Nicholls' abdomen, and other stab wounds to the chest. All of the wounds were sufficient "to cause hemorrhaging externally" as well. In addition, Mrs. Nicholls suffered blunt force injuries to the head with enough force to cause hemorrhaging on the surface of the brain. There were also seven cutting wounds.
>
> As in *Burch*, the jury was instructed on second degree murder based on [Costley's] engaging in conduct either with the intent to kill [Mrs.] Nicholls or the intent to inflict such serious bodily harm that death would be the likely result. Given the nature and number of the injuries inflicted on [Mrs.] Nicholls, the jury in this case was faced with a "compelling inference" that [Costley's] actions "must have been with the intent either to kill or to do such serious bodily harm that death would be the likely result." *See Burch*, 346 Md. at 280. The trial court did not err in declining to instruct the jury as appellant requested.

Costley, 175 Md. App. at 129-30

In the case at hand, Ms. Gerber suffered blunt force injuries, asphyxia, and sharp force injuries. Dr. Brassell, the assistant medical examiner who performed the autopsy on Ms. Gerber, testified that "there were 12 sharp force injuries, including cutting

wounds" on the right and left sides of the front of Ms. Gerber's neck. One of those wounds "caused significant injury" to the deep muscles of the left side of the neck as well as the external jugular vein and the internal jugular vein, which are larger blood vessels within the deeper regions of the neck." As a result of the injuries to the external and internal jugular veins, an air embolism developed and blocked the flow of blood and oxygen, which was "a cause of sudden cardiac death."

Dr. Brassell also observed petechial hemorrhages, or small pinpoint hemorrhages, on Ms. Gerber's eye lids, the inner surface of her eye lids, and the skin of her face. Dr. Brassell explained that although there are a number of potential causes of petechial hemorrhages, they are "a component of asphyxia" that occur when blood is unable to travel through veins that are being compressed causing small blood vessels to burst. Dr. Brassell did not observe any medical condition to otherwise explain the petechiae observed on Ms. Gerber's body. When questioned about the lack of a mark or contusion on Ms. Gerber's neck to indicate that she was strangled, Dr. Brassell explained:

> A choke hold is one of the rare circumstances where we don't often see findings on the neck surface because the pressure is being applied to the neck over a much broader area than with fingertips or with a ligature being applied.

In addition, there were various abrasions on the skin's surface and contusions or bruises on Ms. Gerber's face, neck, torso, and extremities. There were also hemorrhages resulting from blunt force trauma to her scalp. According to Dr. Brassell, in order to develop the contusions and the petechia hemorrhages, blood had to be circulating through her body. As a result, those wounds had to occur prior to the sharp force injuries and the

air embolism which produced "a sudden type of cardiac death." Dr. Brassell opined that the injuries she observed on Ms. Gerber were consistent with an individual who had been beaten, then strangled, and then cut 12 times with a sharp object.

As in both *Burch* and *Costley*, the nature and number of the injuries inflicted upon Ms. Gerber convince us that there was no rational basis for the jury to convict appellant of depraved heart murder, but not first or second-degree murder. Accordingly, the circuit court did not err in refusing to instruct the jury on second-degree depraved heart murder.

JUDGMENTS OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.